Property Markets Group, Inc. *and* Kazimierz Jagielo.
Case 2–CA–34269

June 6, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On November 13, 2002, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings,[1] and conclusions[2] and adopts the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Property Markets Group, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 1(a)–(e).

"(a) Failing and refusing to allow employees to cover for absent employees because of their union membership and activities on behalf of the Union.

"(b) Threatening employees with discharge because of their membership in and support for the Union.

"(c) Discriminatorily issuing employees warning letters because of their union membership and support.

"(d) Unlawfully ordering employees to work double shifts in retaliation for their union activities and support.

"(e) Unlawfully failing and refusing to grant employees Christmas bonuses because of their union membership and activities in support of the Union."

Margit Reiner, Esq., for the General Counsel.
Thomas Walsh, Esq. (Jackson & Lewis, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge filed by Jagielo Kazimierz (Jagielo)[1] on January 8, 2002, a complaint and notice of hearing was issued on April 30, 2002, alleging that Property Markets Group, Inc. (the Respondent), has been engaging in certain unfair labor practices, as set forth in the National Labor Relations Act (the Act), by interfering with, restraining, and coercing Kazimierz Jagielo and Nadya Gervitz in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act, and discriminating against them in regard to hire or tenure or terms and conditions of employment in violation of Section 8(a)(1) and (3) of the Act. By answer timely filed, the Respondent denied the material allegations in the complaint.

A hearing was held before me in New York, New York, on July 15 and 16, 2002. Subsequent to the closing of the case, the General Counsel and the Respondent filed briefs.[2]

On the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent owns and operates residential properties throughout New York City, including 500 West End Avenue, New York, New York, the property involved in this case. The Respondent, a domestic corporation, manages the property at 500 West End Avenue and in the course of all its business operations derives gross rental revenues in excess of $500,000 and receives at its facilities goods valued in excess of $5000 from other enterprises located within the State of New York, each of which other enterprises had received these goods directly from points outside the State of New York. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we find Respondent's contentions without merit.

[2] Member Acosta observes that, although the administrative law judge inferred animus based in part on time-barred conduct, it is settled that the Board may consider such conduct to shed light on events within the limitations period. See *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960). In addition, although the judge considered events underlying previously withdrawn or settled charges, the judge's finding of animus is amply supported by independent, postsettlement evidence occurring within the limitations period. Accordingly, the judge's finding of animus raises neither a limitations nor a due process issue.

[3] We shall modify the judge's recommended Order to conform with the remedial language customarily used for the violations found.

[1] The Charging Party's name is really Kazimierz Jagielo.

[2] At the trial par. 10 of the complaint was amended to read par. 8. General Counsel in its brief withdrew par. 8(f) of the complaint which reads:

> (f) in about early January 2002, the exact date presently unknown, [the Respondent] denied Kazimierz pay by refusing to unlock the locker room door for two hours.

The complaint alleges, the Respondent admits, and I find that John Simonlacaj, property manager, is a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent, acting on its behalf. The Respondent stipulated and I find that Elliot Joseph, the Respondent's asset manager, is a managerial employee and an agent of the Respondent acting on its behalf.[3] The complaint also alleges, but the Respondent denies, that Alek Pilat, the building superintendent at 500 West End Avenue, at all material times was a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent acting on its behalf.[4]

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that Local 32B–32J, SEIU, AFL–CIO (the Union), at all material times, has been a labor organization within the meaning of Section 2(5) of the Act. Additionally, the last collective-bargaining agreement between the Respondent and the Union expired April 1997. Both Nadya Gervitz and Kazimierz Jagielo are members of the Union.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent manages a residential property at 500 West End Avenue, New York, New York (500 West End)[5] in which it employs a superintendent, a handyman, porters, and five doormen; Tony Menarkovich, Margarito Alarcon, Ervin Kolandre, and the alleged discriminatees Jagielo and Gervitz.[6] Both Jagielo and Gervitz have worked at 500 West End for at least 10 years. The Respondent started managing this property sometime after Jagielo and Gervitz began working there, but well before 1997.

The Respondent and the Union have had a prior collective-bargaining history, however the last collective-bargaining agreement expired in April 1997. While the Respondent and the Union failed to reach agreement on a renewal agreement, the wages and benefits of Gervitz and Jagielo, both union members, has remained the same.

Kazimierz Jagielo's Disciplinary Warnings

On November 13, 1997, Jagielo received a written warning for his refusal to follow directions and his overuse of breaktime. On January 5, 1998, Jagielo was suspended for 3 days for arriving late for his shift without notification and for altering his timecards on these occasions. On May 13, 1998, Jagielo was issued a written warning for events that occurred on February 16, March 16, and April 16, 1998, from 1 to 3 months before this warning was issued,[7] and one on April 20, 1998. Jagielo denied these events, testifying that he had not talked loudly during nighttime hours, had not smoked in the building,[8] had not thrown a cigarette butt behind a flower pot, had not altered his timecard on occasions,[9] and had not failed to mop the floors as part of his duties, as alleged in the warning notice of May 13, 1998. Regarding the final incident alleged in the May 13 warning, that of hitting the elevator cab door, Jagielo explained that the elevator door became stuck at times and employees would have to hit it to make it work.

Vladimir Gervitz Arbitration

In 1997 the Respondent discharged Vladimir Gervitz (Vladimir) who then filed a grievance with the Union. After the Union filed for arbitration, an arbitration hearing was held from May 19, 1998, to November 4, 1999, at which Nadya Gervitz testified twice on behalf of her husband Vladimir. On December 8, 1998, Jagielo was subpoened to testify at the arbitration hearing on December 14, 1998, at 9:45 a.m. Jagielo testified that after he showed the subpoena to the then building superintendent, Ricky Kukaj, he was denied permission to attend the arbitration hearing, and Kukaj warned him that if he went to the hearing he would be fired. Jagielo reported Kukaj threat to Vladimir who asked him to write a letter also detailing the threat. When Jagielo failed to appear at the hearing, Vladimir

[3] Elliot Joseph testified that he is responsible for "the overall management" of 500 West End Avenue and "just successfully completed the condominium conversion of that rental property . . . and just overall bringing the quality of the building up to first class status."

[4] Alek Pilat was not called as a witness herein.

[5] Simonlacaj testified that in May 2000, the Respondent elected to convert 500 West End from a rental to a premium condominium building. The renovation involved aesthetic changes to the building and a reorganization of 500 West End's staff necessitated by the December 2000 automation of the building's passenger elevator and the intention to upgrade the building from a class B property to a class A property. Consequently, doormen instead of elevator operators are now required.

[6] Jagielo originally worked as a porter and elevator operator and Gervitz as an elevator operator. Around January 2001, when the elevator was made automatic, all elevator operators became doormen. Currently, Jagielo works the night shift (11 p.m. to 7 a.m.) Tuesday through Friday and the day shift (7 a.m. to 3 p.m.) on Sunday. During the Wednesday and Friday shifts, he works as both a doorman and a porter. During the remaining three shifts, he works exclusively as a doorman. Gervitz, who always worked 2 days a week, currently works as a porter during the day shift on Mondays and as both a porter and doorman during the night shift on Saturdays.

[7] Previously on May 7, 1998, Jagielo had filed a charge with the Board alleging that the Respondent had suspended him on January 5, 1998, for 3 days in violation of Sec. 8(a)(1) and (3) of the Act, it also being received by the Respondent on May 11, 1998. Two days later, on May 13, 1998, the Respondent issued the May 13, 1998 written warning to Jagielo. Simonlacaj testified that this matter was settled without trial, "Basically for money reasons. I really didn't want to pay an attorney, and I really didn't have the time to sit through these hearings myself." The settlement agreement provided for expunging the May 13, 1998 warning notice and posting of a notice assuring employees of their rights under the Act.

[8] Jagieo testified that there was one employee, Prel Gielaj, who smoked on the job in the presence of the former building superintenddent, Ricky Kukaj, but never received any warnings.

[9] Jagielo testified that while he did not alter his timecard, he had seen other employees who had altered theirs, naming employees Alarcon and Kolandreo. Gervitz testified that she, Mike, Tony Menarkovich, the doorman, Tony the handyman, Timmy, Paul, and Alarcon wrote their arrival times on their timecards every Monday afternoon because the cards were not there when they arrived on Monday mornings. The testimony of Jagielo and Gervitz was undisputed either through other testimony or documentary evidence, since the Respondent was unable to produce the timecards stating it no longer had them. Also it is undisputed that any of the employees named by Jagielo and Gervitz as having altered their timecards received warning notices for this.

turned Jagielo's letter over to the Union's attorney who showed it to the arbitrator and the Respondent's lawyer.[10]

According to the testimony of witnesses for both parties when the alleged threats were made known to the Respondent's representative at the hearing, on December 14, 1998, Simonlacaj called Kukaj to find out what had occurred. Simonlacaj testified that Kukaj denied having been told by Jagielo about the subpoena and his required appearance, and denied that he had warned Jagielo not to appear at the hearing or he would be fired. Simonlacaj stated that he then instructed Kukaj to have Jagielo come immediately to the arbitration hearing, and also told this to Jagielo personally over the telephone.

However, Jagielo testified that because of Kukaj's threats he had not appeared at the arbitration hearing on December 14, at the appointed hour. He stated that when Simonlacaj spoke to him on the telephone, Jagielo was told by Simonlacaj to finish his work that day and he would be permitted to attend the next scheduled arbitration session. Gervitz testified that when her husband informed her that Jagielo was not coming to the hearing "because he is afraid," she telephoned him. Gervitz stated that Jagielo told her that Simonlacaj had told him "to come to the next hearing," whereupon Gervitz told Jagielo to come to the arbitration hearing that day, and "in 30 minutes he showed up."[11]

On January 15, 1999, Jagielo filed a charge with the Board, Region 2, regarding Kukaj's threat. On April 26, 1999, Simonlacaj sent a letter to Jagielo assuring him that he would not be retaliated against for testifying at the arbitration hearing. Jagielo then withdrew his charge.

Gervitz' Request to Replace Absent Employees

The arbitrator issued a decision on February 29, 2000, in Vladimir's arbitration upholding the discharge but ordering the Respondent to pay Vladimir severance pay based on the collective-bargaining agreement if he would move out of 500 West End by April 1. In March, the Gervitz' moved out of the building. It had been the practice previously for Nadya Gervitz to fill-in for absent employees about 80 percent of the time, and when she and her husband vacated their apartment at 500 West End, she asked Alek Pilat, the superintendant, to call her to cover for employees who were out, ill, or vacationing. Gervitz stated that Pilat told her "okay."

Gervitz testiifed that in April 2000, doorman Tony Menarkovich went on sick leave. Gervitz had heard from either Menarkovich or another employee, "Margo" that when Menarkovich had asked Pilat to cover for him, Pilat had said "anybody could replace you and cover for you except Nadya." Gervitz stated that she asked Pilat about this and he told her, "it's not my decision. I'm just following the directions or the instructions John Simonlacaj gave me. It's not really my decision." Gervitz related that later in April 2000, she spoke to Pilat again requesting to replace any employees going on vacation. Although it is undisputed that the Respondent had never hired temporary workers before to cover for doormen, Pilat replied that management was going to hire temporary workers to cover for vacationing employees.

Gervitz testified that after speaking to Pilat, she spoke to Wendy Sanchez, another of the Respondent's managers, about replacing employees. Sanchez told her to write to Simonlacaj about her request, which she did on May 29, 2000. When Simonlacaj did not answer her letter, Gervitz again spoke to Sanchez, asking her to speak to Simonlacaj. While Sanchez said she would do so, she also advised Gervitz to "talk directly to my supervisor Alek Pilat." Gervitz also wrote a letter to Pilat on June 7, 2000, requesting to replace employees as she had previously done before.

On June 15, 2000, Gervitz filed a charge with the Board alleging that she was denied the opportunity to replace employees because of her support for the Union. After the filing of the charge, the Respondent allowed Gervitz to replace workers and she withdrew her charge as part of a settlement between the parties. While the Respondent asserts that in late December 2000, "coinciding with the automation of the passenger elevator, PMG decided to use a temporary agency to fill-in for absent doormen", it appears that after the settlement Gervitz has recently filled-in as a doorman for Margarito (Margo) Alarcone six times. Jagielo three times and Irwin Kolandreo once.

Jagielo's Vacation Request

Jagielo testified that in January 2000, he asked Pilat if he could take his vacation on July 21, 2000. Pilat said there would be no problem. On April 24, 2000, Menarkovich told Jagielo that he wanted to take his vacation at the same time as Jagielo. Jagielo related that when he told this to Pilat, Pilat told him he could not take his vacation at the requested time, that "management does not like the members of the Union" and was uhappy that Jagielo appeared and testified at the arbitration hearing. Jagielo then wrote a letter on May 2, 2000, to the Respondent requesting his vacation as originally approved. While he received no response to his letter, Pilat told him that management would not approve his vacation over Menarkovich. Jagielo then filed a charge with the Board, Region 2, on May 19, 2000, alleging that he had been denied his vacation because he had previously filed charges against the Respondent with the Board and had testified at Vladimir Gervitz' arbitration hearing. After the charge was filed, Jagielo was given the vacation he requested and then he withdrew his charge as part of a settlement agreement.

Meetings with Employees

Between December 2000 and May 2001, Joseph held a meeting with all the employees at 500 West End to explain, as part of the conversion to condominium properties, the change in their duties and responsibilities as employees. Joseph explained the new duties of the doormen; that the front door was never to be left unattended, and if a doorman must leave his/her post for an unscheduled break, he/she must contact another employee via walkie-talkie and have that coworker cover for them.[12]

[10] Vladimir Gervitz testified similarly.

[11] Simonlacaj denied that he told Jagielo to come to the arbitration hearing another time and denied telling anyone that Jagielo was afraid to come to the hearing.

[12] While Simonlacaj was not present at this meeting, he testified that Joseph "explained what we were doing with the building and that the level of service had to change. And he explained what the duties were and how they were to act with tenants, guests and that kind of thing."

Shortly after Joseph's meeting with employees, Simonlacaj also held a meeting with the employees of 500 West End. Again employees were told that people coming into the building to view the apartments and those who had already purchased them would expect and want a certain high level of service. Simonlacaj discussed with employees the duties of the doorman; that everyone should be addressed as Mr. or Mrs., cabs should be hailed, open doors for people, help with packages, announce guests and visitors, and have them sign in, "that type of thing."

Gervitz testified about a meeting held on May 29, 2001, by Alek Pilat, the superintendant, with all the employees.[13] She stated that Pilat told them that Elliot Joseph, the Respondent's asset manager did not like how they worked as doormen and wanted to fire all of them. Pilat told them this was simple to do "Like for example, Nadya is a good example." There were protests by the employees about some of the working conditions. Gervitz stated that Pilat said the employees had big salaries and they "will have to work really hard because any time you can get fired," and if you go to the Union for help, it would take many years.

Jagielo testified that about 1 month after this meeting, or in August 2001, Pilat told him that "management does not like the members of the union" and was not happy with the fact that Jagielo had joined the Union. Jagielo stated that Pilat had said that the year before Simonlacaj had mentioned that he doesn't like people being members of the Union, and that Jagielo should keep this conversation between them a secret, confidential. Jagielo also related that Pilat told him that: "we should be careful because we can be terminated because they don't like the members of the Union."[14] Jagielo testified that Pilat repeated that management did not like union members on about five or six other occasions, the last time about half a year or 7–8 months ago. Jagielo also recalled that when Pilat was hired in 2000 he told Jagielo that management did not like him because he had testified at Vladimir's Gervitz' arbitration hearing. According to Jagielo, Pilat said this to him, two or three times, the last time about 7 months ago.

Nadya Gervitz' Disciplinary Warnings

Simonlacaj testified that during Gervitz' employment the Respondent had received numerous complaints about her from tenants and brokers.[15] Moreover, Gervitz had received three written disciplinary warnings from the Respondent. On September 26, 1997, Gervitz received a written warning for leaving her post as elevator operator. On May 25, 2001, Gervitz received a written warning for twice leaving her post as doorman unattended. During a visit to the property, Joseph had observed that Gervitz had left her post as doorman unattended. He warned Gervitz that if she was to leave her doormen post she was to contact another employee to fill in until she returned. Upon Joseph's return to the premises soon thereafter that same day, he again found that Gervitz had deserted her post, but this time having a visiting friend fill in for her for a short time. Joseph reported this to the Respondent and Simonlacaj then issued Gervitz her second warning notice. Gervitz explained that on May 25, 2001, when Joseph twice came by, she was in the ladies' room, the first time to wash her hands after lunch and the second time to use the bathroom. Gervitz stated that while she was in the bathroom she had locked the front door in order to protect the building since no one was available to cover for her.[16]

The General Counsel, in her brief, contests Joseph's allegation that Gervitz was a "caricature of a doorman," in a derogatory manner. She notes that this related to "comportment." In agreement with the General Counsel, I observed that Nadya Gervitz had a pleasant attitude while as a witness, was at all times courteous, and comported herself well. She dressed appropriately for trial in a suit and answered questions in a clear voice. I did not find this in anyway diminished by the requirement that she gave her answers through an interpreter.

Nadya Gervitz' third written warning notice, which is one of the events at issue in this case, occurred on December 12, 2001. Gervitz testified that on Monday, November 19, 2001, Pilat informed Gervitz that because surveillance cameras were being installed, he could watch the employees. Gervitz, "interested," asked Pilat if he could show her how the cameras worked. Pilat told her the monitor was in the room off the lobby. Gervitz described the room and area as follows: when you enter the room from the lobby, there is an empty area. To the right of that area is a room with the monitor, a desk, and a wall unit (right room). To the left of the empty area is a small room with cleaning supplies and a sink (left room). Off the left room is a bathroom.

After speaking with Pilat, Gervitz went to the left room to get some cleaning supplies. Gervitz testified that as she was walking out through the empty area in the middle, she noticed that the door to the right room was open and she stopped and went closer to look at the monitor while putting on her cleaning gloves. Gervitz stated that at that moment, Joseph and another man came into the room and Joseph started screaming at her that she shouldn't be in that room, whereupon Gervitz left to perform her duties. Gervitz related that later that day Pilat advised her that she would receive a warning notice for being in the room with the monitor.

[13] Simonlacaj testified that he had asked Pilat to call this employee meeting because he was receiving complaints from tenants and brokers about the doormen being absent from their posts, smoking on the job, not being courteous, and not directing people sitting in the lobby where to go.

[14] Jagielo filed a charge with the Board regarding this on November 20, 2001. On January 18, 2002, the Respondent signed a settlement agreement, which involved the posting of a notice to employees assuring them they would not be threatened with discharge because of their membership in or activities on behalf of the Union.

[15] In February 1999, a tenant wrote to Simonlacaj threatening to take legal action against the Respondent if Gervitz did not stop inappropriately questioning the tenants' children and housekeeper.

[16] Joseph testified that when he saw Gervitz come to the door, she was coming from the direction of the toilet and sink. Also, Simonlacaj testified that no one was available to relieve the doormen on the second and third shifts. Moreover, Gervitz testified that no one in management ever told her that she needed someone to cover her post if she went to the bathroom. Interestingly, the warning notice about Gervitz leaving her post unattended fails to mention Joseph's contention that Gervitz had a friend watching the door in her absence.

In late December, Pilat handed Gervitz a warning letter dated December 12, 2001, along with a list of rules. Gervitz testiified that Pilat told her that she and Jagielo should be very careful because the owner would do everything possible to catch them "on something and fire them." Gervitz stated that she had never been told by anyone not to go into the room with the monitor and that workmen such as painters went in and out of that room looking at the monitor and left their supplies and clothes in the empty area right next door. Gervitz also testified, contrary to the warning letter, that the monitor is not in the superintendent's office as that office is in the basement, and that the room with the monitor contains no confidential materials or apartment keys.

The Respondent alleges that Gervitz was "inappropriately being in the superintendent's office without supervision . . . watching the building's moniotoring system," and therefore was issued the third warning letter. Joseph testified that the Respondent had put in cameras to "montor deliveries and contractors and so forth," and we also moved the superintendent's office to the ground floor right next to the package room. Joseph stated that when he came into the building he found Gervitz, while acting as a porter, inside the "Super's Office, which she wasn't supposed to be, staring at the camera. Staring at the video monitor." Joseph related that the keys to the apartments, confidential materials (sales agreements), and valuables such as deliveries are kept in the superintendent's office, which is locked.[17] He added that the monitor was also kept in the superintendent's office.

Additional Refusal to Allow Gervitz to Replace Employees

Gervitz testified that in July 2001, Alarcon had told her that he asked Pilat if Gervitz could replace him on Sunday because he needed the day off and only Gervitz wanted to work on Sunday. Gervitz stated that Alarcon asked her to call Pilat since Pilat had said anyone could replace Alarcon except Gervitz, and remind him of the prior agreement with the Board. Gervitz related that when she called Pilat about replacing Alarcon, Pilat told her to speak to Simonlacaj. Gervitz testified that a day or two later when she asked Simonlacaj if she could replace employees who went on leave or vacation, he told her to speak with Pilat. Gervitz said that when she spoke to Pilat he told her to speak to Simonlacaj. When Gervitz did so, Simonlacaj insisted that she was to ask Pilat about this. Gervitz indicated that when she made her request again to Pilat, "he said 'you should understand Nadya.' Then I said 'is it like a game which is continuing?' He laughed and he said 'yes.'"[18]

In August 2001, Gervitz again asked Pilat if she could replace Menarkovich when he went on vacation. Pilat told her she could not. Since then, although Menarkovich took a 4 week vacation in August 2001, Alarcon took 2 weeks in November and 10 days in January, Jagielo took 3 weeks in May, and Kolandreo took 4 weeks in May, Gervitz testified that she has substituted for employees for a total of only 10 days.

Jagielo's December 12, 2001 Warning

On December 12, 2001, the Respondent isued a warning letter to Jagielo for smoking while on duty and failing to assist tenants with packages. Jagielo testified that, contrary to the letter's assertions, he did not smoke on the job nor had a tenant asked him to get something from the package room, which he allegedly refused to do. Jagielo stated that in May 2001, Simonlacaj told him that the doorman could not help the people with packages because the package room was a "self-help place," and since the package room was "far away from the main door, they could not see who was entering the building."[19] Gervitz testified that Jagielo had told her of this conversation with Simonlacaj and that in May 2001, Pilat had told her the same thing. Gervitz further testified that Menarkovich and Alarcon told her that Pilot had told them as well not to help with packages.[20]

Jagielo's Coverage of Alarcon's Shift

In December 2001, Pilat asked Jagielo to cover for Margarito Alarcon, who could not attend his shift that day. Jagielo testified that he explained to Pilat that this would mean that he would be working two shifts in a row and then would have to come in 8 hours later for a third shift handling garbage. Jagielo stated that he suggested that Gervitz be used to cover for Alarcon since she worked only part time. Jagielo related that Pilat told him that if he didn't replace Alarcon for that shift, he should not come to work anymore. Jagielo then worked the entire shift although he stated that he was extremely tired. The Respondent asserts that this occurs infrequently and it is standard procedure to have the employee remain on post until the absent employee returns to duty.

Yearend Bonuses

The parties stipulated that Jagielo and Gervitz were the only two employees who did not receive yearend bonuses in 2001. Both Gervitz and Jagielo testified that in previous years, they had received such bonuses. Simonlacaj testified that he had decided that Gervitz and Jagielo were underserving of such bonuses. Simonlacaj stated that he based his decision on Gervitz' disciplinary record and regarding Jagielo, based on the various times he had been observed out of uniform and counseled by Simonlacaj for this, his refusal to help tenants with packages, failing to announce visitors, and his smoking in front of the building while on duty.

It should be noted that Jagielo currently remains a full-time employee of the Respondent's at 500 West End Avenue.

[17] By letter dated October 18, 2001, Simonlacaj informed Pilat that because of tenant complaints, the Respondent was moving the superintendent's office to the lobby. Gervitz testified that she believed that the superintendent's office had not been moved to the lobby, but remained in the basement.

[18] I agree with the General Counsel's assertion in her brief that Simonlacaj abetted by Pilat was playing some sort of game with Gervitz, sending her back and forth.

[19] Simonlacaj denied that he said this. However, Jagielo did admit receiving a memorandum from the Respondent dated November 28, 2001, which prohibited smoking during working hours and directs doormen to assist tenants with packages.

[20] Prior to Jagielo's warning letter, in an affidavit given by Gervitz to a Board agent, she stated that Pilat has suggested that doormen do not help with packages.

Credibility

With regard to the credibility of the respective parties' witnesses, after carefully considering the record evidence, I have based my findings on the observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *American Tissue Corp.*, 336 NLRB 435 (2002); *New York University Medical Center*, 324 NLRB 887 (1997); *Gold Standard Enterprises*, 259 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); and *Northridge Knitting Mills*, 223 NLRB 230 (1976). I tend to credit the testimony of the General Counsel's witnesses. Their testimony was given in a forthright manner, generally consistent and corroborative of each others, and consistent with other believable evidence in the record. Further, based on their demeanor, I found them to be trustworthy as witnesses.

This is not to say that I discredit all of the testimony of the Respondent's witnesses, expecially where it does not conflict with that of the General Counsel's witnesses.[21]

However, of compelling significance in discrediting their testimony where it conflicts with that of the General Counsel's witnesses, was the Respondent's failure to call its superintendent, Alek Pilat, as a witness, to rebut any of the testimony given herein or to corroborate the testimony of the Respondent's witnesses. Pilat, it appears, was actively involved in important issues and was uniquely situated with first-hand knowledge and might well have been able to specifically detail and clarify what had occurred.[22]

Analysis and Conclusions

The complaint alleges that Alek Pilat, the Respondent's superintendent, is a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent, acting in its behalf. The Respondent denies this.

Section 2(11) of the Act provides:

> The term "supervisor means any individual having the authority, In the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with "geniune management prerogatives" should be considered supervisors and not "straw bosses, leadman, set-up men and other minor supervisory employees." S. Rep. No. 105, 80th Cong. 1st Sess. 4 (1947).

The status of supervisor under the Act is determined by an individual's duties, not by his or her title or job classification. *New Fern Restorium Co*., 175 NLRB 142 (1969); *Longshoremen ILA v. Davis*, 476 U.S. 380, 396 fn. 13 (1986). It is well settled that an employee cannot be transformed into a supervisor merely by the visiting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. *Advanced Mining Group*, 260 NLRB 486 (1982); *Magnolia Nursing Home*, 260 NLRB 377 (1982). To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer statutory status. *Cypress Lawn Cemetry*, 300 NLRB 609 (1990); *Superior Bakery*, 294 NLRB 256 (1989), enfd. 893 F.2d 493 (2d. Cir. 1990); and *Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982).

However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *HS Lordships, Wilson-Crissman Cadillac,* 659 F.2d 728 (6th Cir. 1981). Indeed as the Court stated in *Beverly Enterprises,* 661 F.2d 1095 (6th Cir. 1981), "Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's, interest before such exercise of authority becomes that of a supervisor." Thus, the exercise of some supervisory authority "in a merely routine, clerical, perfunctory or sporadic manner does not elevate an employee into the supervisory ranks," the test must be the significance of his judgment and directions. *Wilson-Crissman Cadillac, Inc*., supra; *Lakeview Health Center*, 308 NLRB 75 (1992); *Hydro Conduit Corp*., 254 NLRB 433 (1981). Consequently, an employee does not become a supervisor merely because he gives some instructons or minor orders to other employees. *Wilson-Crissman Cadillac*, supra.

Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Federal Compress Warehouse Co*., 398 F.2d 631 (6th Cir. 1968). Additionally, the existence of independent judgment alone will not suffice for "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." *Advance Mining Group*, supra; *Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1948). In short, "some kinship to management, some empathetic relationship between

[21] It is not unusual that, based on the evidence in the record, the testimony of a witness may be credited in part, while other segments thereof are discounted or disbelieved. *Jefferson National Bank*, 240 NLRB 1057 (1979), and cases cited therein.

[22] From the failure of a party to produce material witnesses or relevant evidence obviously within its control without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. *Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987); *7-Eleven Food Stores*, 257 NLRB 108 (1981); *Publishers Printing Co.*, 233 NLRB 1070 (1977).

The Respondent in its brief alleges that "General Counsel originally subpoenaed superintendent Alek Pilat . . . previously required Mr. Pilat to attend the hearing . . . [and] did not call him as a witness." The Respondent seeks an adverse inference as above to be drawn against General Counsel. However, I have read the entire record including all the exhibits, and nowhere do I find any mention of the General Counsel having subpoenaed Pilat or that Pilat was present at the trial. Pilat, as will be indicated subsequently, was obviously within the control of the Respondent who, if it wanted his testimony, should have called him as its witness.

employer and employee must exist before the latter becomes a supervisor for the former." *Advance Mining Group*, supra; *Security Guard Service, Inc*., 384 F.2d 1 (10th Cir. 1967). Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a "supervisor" within the meaning of the Act rests on the party alleging that such status exists. *Pine Brooks Care Center*, 322 NLRB 740 (1996); *Ohio Masonic Home*, 295 NLRB 390 (1989); *RAHCO, Inc.*, 255 NLRB 235 (1983); *Tucson Gas & Electric Co*., 241 NLRB 181 (1979).[23] Where the possession of any one of the aforementioned powers is not conclusively established or "in borderline cases" the Board looks to well-established secondary indicia, including the individuals' job title or designation as a supervisor, attendance at supervisorial meetings, job responsibilities, authority to grant time off etc., whether the individual possess a status separate and apart from that of rank-and-file employees. *Chicago Metallic Corp*., 794 F.2d 527 (9th Cir. 1986); *Monarch Federal Savings & Loan*, 237 NLRB 844 (1978); *Flexi-Van Corp*., 228 NLRB 956 (1977). However, when there is no evidence that an individual possesses any one of the several primary indicia for statutory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J.C. Brock Corp*., 314 NLRB 157 (1994); *St. Alphonsus Hospital*, 261 NLRB 620 (1982). Additionally, whenever there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria.

In *Health Care & Retirement Corp.*, 511 U.S. 571 (1994), the Supreme Court set forth the test for determining whether an individual is to be deemed a supervisor. The Court noted that in making a determination on the question of one's supervisory status:

> [T]he statute requires the resolution of three questions and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities [in section 2(11)]? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold authority "in the interest of the employer"? [511 U.S. 573–574.]

Thus, the burden of proving that Alek Pilat is a supervisor within the meaning of Section 2(11) of the Act rests on the General Counsel who alleges this in the complaint. The evidence shows that Building Superintendent Alek Pilat at 500 West End did not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees or adjust their grievances or effectively recommend such action. However, the General Counsel contends that Pilat assigned and directed the employees at 500 West End and that this authority was exercised not in a merely routine or clerical fashion, but required the use by him of independent judgment.

Applying the indicia of assignment and responsibility directly to the facts of a specific case is often difficult. There are no hard and fast rules: instead each case turns on its own particular facts. Clearly, not all assignments and directions given by an employee involve the exercise of supervisory authority. *Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967). Consequently, the Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendations and forceful suggestion and between the appearance of supervision and supervision in fact. *Demco New York Corp.*, 337 NLRB 850 (2002); *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993).

Gervitz testified that Pilat assigned her duties outside her normal ones, told her to fill in for other employees, gave her permission to take vacation, and she referred to Pilat as her current boss. Gervitz stated that she was never told to call Simonlacaj if she was out sick or wanted vacation. When Gervitz moved out of the building she asked Pilat to call her to cover for other employees. Gervitz related that Wendy Sanchez, one of the Respondent's managers, referred to Pilat as Gervitz' supervisor. Also, when Gervitz asked Property Manager Simonlacaj, about covering for vacationing employees, he told her to discuss this with Pilat.

Jagielo testified that Pilat authorized sick leave and vacation time, told him to fill in for other employees, and assigned him duties outside his normal ones. Jagielo stated that Pilat on one occasion had referred to himself as the "boss." Jagielo also testified that Daisy Gonzalez, who Simonlacaj admitted was a former director of the Respondent, told Jagielo to do whatever the superintendent told him to do.

Upon the basis of the above, the General Counsel asserts that the Respondent's building superintendents "possessed several of the indicia of supervisory authority and are, therefore, supervisors within the meaning of the Act." I do not agree.

The evidence shows that Alek Pilat is not a supervisor within the meaning of Section 2(11) of the Act.[24] He does not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees or adjust their grievances or effectively recommend such action. Moreover, General Counsel has failed to establish that Pilat's assignment of tasks whether routine or outside their regular duties, even of his granting of sick leave or vacation time, required the use of independent judgment on his part.[25]

The Respondent's property manager, Simonlacaj makes all decisions regarding discipline. Pilat does not have the authority to issue disciplinary warnings and merely reports incidents to

[23] However, in *Health Care & Retirement Corp. of America*, 987 F.2d 1256 (6th Cir. 1991), the Sixth Circuit held that the General Counsel has the burden of establishing supervisory status.

[24] The Board has often held that building superintendent's are nonsupervisory employees. *Cassis Management Corp.*, 323 NLRB 456, 459 (1997); *Hagar Management Corp*., 313 NLRB 438, 439 (1993); *J.R.R. Realty Co*., 273 NLRB 1523, 1527 (1985); and *Elias Mallouk Realty Corp.*, 265 NLRB 1225, 1234 (1982).

[25] Simonlacaj testified while employees call into Pilat to report sick leave, Pilat will work it out. Only Simonlacaj can grant leave. Moreover, as to vacations, employees' requests are made to Pilat but the vacation schedules are made and approved by Simonlacaj.

Simonlacaj. As building superintendent, Pilat's authority is limited to directing, overseeing, and assigning the routine daily functions of the employees at 500 West End, whose jobs are almost entirely the routine execution of daily duties.

Indeed, repair and maintenance work performed by Pilat and the handyman is often routine, but even where it is an emergency repair, it is commonplace. Further, any decision concerning which employee (the superintendent or the handyman) will perform a given task is dependent upon the relative skills and availability of the two men, with Pilat possessing greater experience. In such circumstances, any direction given by Pilat would appear purely routine or clerical. Additionally, employees are required to contact Simonlacaj on personnel matters. Moreover, Pilat is required to contact Simonlacaj for anything out of the ordinary, i.e., a leaking pipe. Also. Simonlacaj is in daily contact with Pilat by telephone and pager, and has regular contact with the employees through his twice-a-week visits to the building.

I conclude on the basis of the foregoing recital of facts that the superintendents are not statutory supervisors within the meaning of the Act, but are in the nature of more experienced, senior employees who routinely supervise the maintenance of the building, but subject to regular and constant higher supervision. Accordingly, I find that the superintendents do not assign and direct unit employees in a manner requiring the use of independent judgment, nor do they possess any other indicia of supervisory status within the meaning of Section 2(11).[26]

General Counsel also asserts that, "Assuming, arguendo, that Pilat and former superintendents were not supervisors, the evidence demonstrates no question but that they were Respondent's agents."

Section 2(13) of the act provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Legislative history dictates that the Board is to apply common law principles of agency in determining who is an agent under the Act. See *Longshoremen ILA (Coastal Stevedoring Co.),* 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995). In *Longshoremen ILA (Coastal Stevedoring Co.)* supra, the Board noted that "when applied to labor relations, however, agency principles must be broadly construed in light of the legislative policies embedded in the Act." Moreover, in *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996), the Board held that the "common law principles of agency incorporate principles of implied and apparent authority." See *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988) in which the Board noted:

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question. *Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn.4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency Section 27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id. at Section 8.

See also *Great American Products*, 312 NLRB 962, 963 (1993); *Dentech Corp.*, 294 NLRB 925 (1989).

As stated in a more subjective manner, "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993); *Shen Automotive Dealership Group*, supra. The Board has also held that the burden of proof is on the party asserting that an agency relationship exists. *Shen Automobile Dealership Group*, supra. Also see *National Gypsom*, 293 NLRB 1138 (1989), enfd 901 F.2d 1130 (D.C. Cir. 1990); *Matheson Fast Freight*, 297 NLRB 63 (1989).

That the superintendents are agents of the Respondent whose statements and conduct would be binding upon it is clearly evidenced in the instant case. After Simonlacaj and then Joseph held meetings with the employees detailing what was expected of the employees pursuant to the building's conversion, Simonlacaj directed Pilat to hold a third meeting on May 29, 2001, to reiterate what management expected of them. The employees could only believe that Pilat was speaking to them as an agent of the Respondent when he passed along management rules and regulations as told to the employees at the previous meetings. When Gervitz asked Pilat if she could fill in for other employees she was told that management had instructed him not to allow her to do so. Additionally, when Jagielo woke Pilat up to find out who his relief on the job was, when fellow employee Kolandreo went on vacation and Pilat angrily told him he would tell the building owner to fire him, Jagielo was so worried and believed that this could occur because Pilat was so closely identified with management that he returned to apologize to Pilat for waking him. Pilat responded to Jagielo's appeal to management regarding his 2000 vacation request. Moreover, Respondent's manager, Wendy Sanchez, referred to Pilat as Gervitz' supervisor and former director, Daisy Gonzalez, told Jagielo to do whatever the superintendent told him to do. Also, Kukaj told Jagielo that if he attended Vladimir Gervitz' arbitration he would be fired and Jagielo believed that would happen and did not at first appear at the hearing.

Thus, from Pilat and the former superintendents real and perceived authority over the Respondent's employees, includ-

[26] *Cassis Management Corp*., supra; *Hagar Management Corp*., supra; *J.R.R. Realty Co*., supra; *Elias Mallouk Realty Corp*., supra. Also see *Mississippi Power & Light*, 328 NLRB 965, 972 (1999); *Washington Nursing Home, Inc*., 321 NLRB 366, 372 (1996); *Kent Products*, 289 NLRB 824 (1988); and *Delta Mills*, 287 NLRB 367 (1987).

ing all of the above, the Respondent can be held responsible for their conduct as its agents, "where under all the circumstances the employees would reasonably believe that [Pilat and the former superintendents] were reflecting company policy and acting on behalf of management." *Shen Automobile Dealership Group*, supra; *Kosher Plaza Supermarket*, supra.

The test for agency is whether under all the circumstances, an employee could reasonably believe that the alleged agent or agents were reflecting company policy and speaking for management. That test is met here. *Waterbed World*, 286 NLRB 425, 426–427 (1987). Moreover, as Section 2(13) of the Act provides, "the question of whether specific acts performed were actually authorized or subsequently ratified shall not be controlling."

I therefore find and conclude that Alek Pilat and former Superintendent Ricky Kukaj are agents of the Respondent acting on its behalf within the meaning of Section 2(13) of the Act. Also see *J.R.R. Realty Co.*, supra; *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980).

The Respondent's Past Conduct as Animus

In May 1998, Jagielo filed charges with the Board. On May 13, 1998, 2 days after receiving notice of this charge, the Respondent issued a warning notice to Jagielo detailing a series of alleged violations that occurred 1 to 3 months earlier. Before Jagielo had filed this charge with the Board, the Respondent's practice was to issue him any warnings promptly and usually with regard to events which occurred on one particular date. This, when considered with the timing of the warning notice, its asserted lack of merit, and the disparate treatment accorded Jagielo compared to other employees engaged in the same alleged violations, an inference can reasonably be drawn that the Respondent issued the May 13 warning notice to Jagielo because he filed charges with the Board.[27] That Jagielo may have received prior warnings, which he contended were unmerited but which may not have been unlawful under the Act, does not mean that every unmerited warning should be excused as lawful. Unlawful warnings can follow lawful ones. *Teksid Aluminum Foundry*, 311 NLRB 711, 721 (1993).

In December 1998, the then-Superintendent Ricky Kukaj threatened Jagielo with discharge if he attended and testified at Vladimir Gervitz' arbitration hearing as a witness for the Union, although subpoenaed to appear. Since I found that Superintendent Kukaj was an agent of the Respondent, his threat to Jagielo indicates the Respondent's intention at the time to discourage Jagielo's participation in an activity on behalf of the Union.

After the arbitrator's decision in Vladimir Gervitz' arbitration case, requiring the Gervitz' to vacate their apartment at 500 West End Avenue, but also requiring the Respondent to pay Vladimir Gervitz 9 weeks of severance pay, the Respondent in April 2000, within 2 months of the arbitration decision and within 1 month of the payment to Vladimir Gervitz, ceased allowing Vladimir's wife Nadya to cover for absent employees although in prior years she had done this 80 percent of the time. Moreover, the Respondent now stated that it would use temporary outside workers to cover for absent doormen, something it had never done before.

Prior to April 2000, Gervitz had received only one written warning issued on September 26, 1997, over 2-1/2 years earlier. While Gervitz admitted leaving the elevator unattended, the basis for the warning notice, she explained that she did so to help a tenant with luggage as she was expected to do.[28] Additionally, after Gervitz filed a charge with the Board regarding this, the Respondent then began to again allow her replacement work, on a limited basis. The timing of the Respondent's decision to cease offering Gervitz replacement work, Gervitz' past record of only one written warning 2-1/2 years earlier, and the Respondent's decision to suddenly begin using outside temporary workers to cover for vacationing employees, raises the implication that the real reason the Respondent stopped allowing Gervitz to cover for absent employees, a job she had performed for years, was antiunion animus.

It is interesting to note that Pilat at first approved Jagielo's request for vacation and then in April and May 2000 denied Jagielo's request after he learned that another more senior employee wanted the same vacation time. Pilat told Jagielo that he could not take his vacation at the same time as Menarkovich, the other employee, and that management did not like Union members and was unhappy with Jagielo because he testified at the arbitration hearing.[29]

However, the record shows that the Respondent does allow two employees to take vacation at the same time. Gervitz testified without contradiction that Jagielo and fellow employee Kolandreo had taken their vacations at the same time. Additionally, after Jagielo filed a charge with the Board regarding the Respondent's failure to grant him his vacation, the Respondent allowed Jagielo to take the vacation he requested, and at the same time as Menarkovich did. When Pilat denied Jagielo's vacation request he told him that the Respondent did not like the union members and was unhappy that Jagielo had testified at Vladimir Gervitz' arbitration hearing. While Simonlacaj denied ever discussing the Union with Pilat, as indicated here-

[27] An important element in establishing a violation of the Act is timing. *Armstronmg Rubber Co*., 238 NLRB 625, 626 (1987), enfd. 849 F.2d 608 (6th Cir. 1988); *Wayne W. Sell Corp*., 281 NLRB 529 (1986), also as are pretexual motives, *Waste Stream Management*, 315 NLRB 1099, 1126 (1994), and disparate treatment, *Fluor Daniel, Inc*., 304 NLRB 970, 971 (1991), enfd. 976 F.2d 744 (11th Cir. 1992), rehearing denied 980 F.2d 1449 (11th Cir. 1992).

[28] Simonlacaj testified that prior to April 2000, he had received several tenant complaints about Gervitz' inappropriately questioning their help and their children. By letter dated February 12, 1999, a tenant complained about this to the Respondent. Simonlacaj testified that he did not issue Gervitz a warning letter about this or the other tenant complaints, but instead told Gervitz not to engage in such conduct. Gervitz denied ever inappropriately questioning anyone and that Simonlacaj ever spoke to her about such issues. The fact that the Respondent did not issue Gervitz a written warning about this alleged inappropriate behavior on her part would support Gervitz' denial of having done this and that no one spoke to her about the issues in the letter.

[29] Coincidentally, the denial of vacation to Jagielo, who with Gervitz, were the only two employees who testified at Vladmir Gervitz' arbitration hearing, took place at the same time that the Respondent denied Gervitz the right to cover for absent employees, and within 2 months of the arbitrator's decision and within 1 month of the severance payment to Vladimir Gervitz.

inbefore, the Respondent failed to call superintendent Pilat, found to be its agent, whom it stilll employs, to testify, leaving Jagielo's testimony unrefuted.[30]

Given the timing and pretextual nature of the Respondent's refusal to initially grant Jagielo his vacation, and the unrefuted testimony that Pilat stated that this refusal was because management was unhappy with Jagielo because he was a union member and had testified at the arbitration hearing it seems clear that he was denied his vacation because of his union activities.

Of additional significance is the credible testimony of Pilat's numerous statements evincing the Respondent's animus towards the Union. When Jagielo was hired Pilat told him that the Respondent did not like Jagielo because he testified at Vladimir Gervitz' arbitration. Pilat repeated this in April 2000, and again early this year. Moreover, Pilat on several occasions, the last one occurring in August 2001, told Jagielo that the Respondent did not like union members and that the union members should be careful or they could be fired. Gervitz testified that at the May 29, 2001 meeting, Pilat stated that the employees had a big salary,[31] could get fired at any time, and, if that happened, no one would help them; that if they went to the Union, it would take many years.[32]

Alleged Violations of Section 8(a)(1) and (3)

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp*., 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries his/her burden of persuading that the employer acted out of antiunion animus, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 277 (1994); *Southwest Merchandising Corp.*, 53 F.3d 1334 (D.C. Cir. 1995); *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, supra. Also see *J. Huizinga Cartage Co.*, 941 F.2d 616 (7th Cir. 1991).[33] However, when an employer's motives for its actions are found to be false the circumstances, may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp*., 362 F.2d 466 (9th Cir. 1966); *Limestone Apparel Corp*., 255 NLRB 722 (1981); *Golden Flake Snake Foods*, 297 NLRB 594 fn. 2 (1990). See also *Peter Vitalie Co*., 313 NLRB 971 (1994). The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer's actions were illegally motivated. *Associacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Services Co.*, 285 NLRB 81 (1987); *O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir.1991). That finding may be based on the Board's review of the record as a whole. *ACTIV Industries*, 277 NLRB 356 (1985); *Health International*, 196 NLRB 318 (1972).

In carrying its burden of persuasion under the first part of the *Wright Line* test the Board requires the General Counsel first to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. *Manno Electric, Inc.*, supra at fn. 12. *Wright Line*, supra. In establishing unlawful motivation, the General Counsel must prove not only that the employer knew of the employees union activities or sympathies, but also that the timing of the alleged reprisals was proximate to the protected activities and that there was antiunion animus to "link the factors of timing and knowledge to the improper motivation." *Hall Construction*, 941 F.2d 684 (8th Cir. 1991); *Service Employees Local 434-B*, 316 NLRB 1059 (1995).

Additionally, the Board in *Ferragon Corp*., 318 NLRB 359, 361 (1995), enfd. 88 F.3d 1278 (D.C. Cir. 1996), stated:

> As explained in *W.R. Case & Sons Cutlery Co*., 307 NLRB 1457, 1463 (1992), "a prima facie case [of discriminatory motivation] is made out by proof of employee union activity, along with employer knowledge of, and employer animus toward, it."

The Refusal to Assign Nadya Gervitz her Normal Amount of Replacement Work

In this case, the evidence establishes that Gervitz is a union member and participated in her husband's arbitration hearing. Gervitz also filed a charge with the Board which alleged that, in 2000, she had been denied the right to substitute for absent employees because of her union activities. It is clear that the Respondent was aware of Gervitz' union membership, her testimony at the arbitration, and the charge she filed. Additionally, in numerous acts and statements, the last of which occurred earlier this year, the Respondent evinced animus toward both Gervitz and Jagielo because of their union activity and their seeking the Board's assistance in their rights under the Act.

[30] General Counsel contends, "[I]t is well settled that the failure by a party to call knowledgeable persons as witnesses gives rise to an inference that, had they been called, their accounts would not have been favorable to that party." *United Technologies Corp*., 277 NLRB 584, 585 (1985), and asserts that such an adverse inference is warranted here. I agree. Also see fn. 22.

[31] While there is no current collective bargaining in effect, the Respondent continues to pay employees the same wages and benefits as it did under the expired bargaining contract. *Air Vac Industries*, 282 NLRB 703, 712 (1987).

[32] As for Simonlacaj's denial that he told Pilat that he wanted employees fired because of their union activity, his denial is not credible in view of the Respondent's failure to call Pilat to deny the statements attributed to him. *United Technologies Corp.*, supra. Also see fn. 22.

[33] An employer simply cannot present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *T & J Trucking Co*., 316 NLRB 771 (1995); *GSX Corp*., 918 F.2d 1351 (8th Cir. 1990).

In 2000, the Respondent refused to allow Gervitz to cover for other employees and then permitted her to do so after she filed a charge with the Board. However, in 2001, the Respondent once again refused to allow Gervitz to replace employees. Since August 2001, Gervitz, who previously covered for absent employees 80 percent of the time, has covered for employees only about 10 days although employees have taken a total of 15 weeks of vacation.

From the above, I find that General Counsel has made out a prima facie case that the Respondent discriminated against Nadya Gervitz by refusing to allow her to cover for absent employees since August 2001, because of her union membership and activities. Once General Counsel has made a prima facie showing sufficient to support the inference that the protected conduct motivated the employer's actions, the burden shifts to the employer to demonstrate that its same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The Respondent asserts that because of the need for an increased level of performance by the staff due to the conversion of the building to expensive condominium units, Nadya Gervitz was not qualified to cover for other employees. Simonlacaj testified that Gervitz was "horrible" as an employee, and that he received many complaints about her before and after Gervitz became a doorman in January 2001. The record shows that Gervitz had received only two warning notices in 5 years, both of which Gervitz asserted were unmerited,[34] and interestingly, neither of these warnings mentioned any of the problems the Respondent alleged it had with Gervitz, i.e., that she had a bad attitude, was discourteous, indiscrete, and failed to announce visitors.[35] Moreover, it would seem incredible that upon the change from elevator operators to doormen and in upgrading the quality of the building to expensive condominium units, the Respondent would make Gervitz a doorman in January 2001, if the Respondent had been having the problems it allegedly was having with her.

The Board has stated that although timing is a factor in establishing a violation, "[i]t is also well settled . . . that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. The motive may be inferred from the total circumstances proved." *Waste Stream Management*, 315 NLRB 1099, 1126 (1994).

From all of the evidence, I find that the reason offered by the Respondent as its defense for taking away Gervitz' right to cover for absent employees to the extent she had done so previously is not its true motive for such action. This, together with the totality of the circumstances; the history of the Respondent's discriminatory actions toward Gervitz and Jagielo—the only two employees who testified at Vladimir Gervitz' arbitration hearing, the Respondent's statements of animus against the Union which continued into 2002, her filing of charges with the Board against the Respondent, lead inexorably to the conclusion that it is the Respondent's animus towards Nadya Gervitz' union activities and membership that motivated it to deny Gervitz work covering absent employees.

From all of the above, I find and conclude that the Respondent discriminated against Nadya Gervitz by denying her replacement work since August 2001 because of her union membership and activities in violation of Section 8(a)(1) and (3) of the Act.[36]

December 12, 2001 Warning Letter to Gervitz

The issuance of a warning notice in retaliation for union activities is a violation of Section 8(a)(1) and (3) of the Act. *Hanson Aggregates Central, Inc*., 337 NLRB 870 (2002).

On December 12, 2001, Gervitz received a warning letter for allegedly "inappropriately entering the superintendent's office without supervision" and "being . . ." alone in the superintendent's office watching the building's security monitoring system." The warning alleges that the superintendent's office is where confidential materials and keys to the tenants' apartment's are stored. Gervitz credibly testified that she had looked at the surveillance monitor as she was leaving the cleaning supply room and that the monitor is not located in the superintendent's office. Gervitz stated that the room with the monitor does not contain any confidential documents or tenants' keys.

Gervitz' union activity and the Respondent's knowledge of this and animus towards that activity, and the timing of the warning notice apparently in relation to her union activities, and Pilat's statements that the Respondent did not like its employees being union members and would like to get rid of them, support a finding that the General Counsel has made out a prima facie case that the December 12, 2001 warning notice to Nadya Gervitz was in retaliation for her union membership and activities. Moreover, when Pilat gave Gervitz the warning notice he told her that she had to be very careful because the owners would do everything possible, even put incorrect things in warning letters, to catch her and Jagielo and fire them. This testimony was not controverted.[37]

[34] Gervitz' first written warning in September 26, 1997, was for leaving her post as an elevator operator. The second warning was on May 25, 2001, for leaving her post as a doorman unattended.

[35] Gervitz denied failing to announce visitors and that the Respondent never told her that she failed to announce visitors or complained to her about her being indiscreet.

[36] The Respondent's refusal to allow Gervitz to cover for absent employees since August 2001, because of her union membership and activities amounted to a reduction in her work assignments and equivalent to reducing Gervitz' earning potential and is a violation of Sec. 8(a)(1) and (3) of the Act. *Georgia Farm Bureau Mutual Insurance Cos.*, 333 NLRB 850 (2001); *Lawson Printers*, 271 NLRB 1279, 1284-1285 (1984); *Jimmy Dean Meat Co*., 227 NLRB 1012, 1020–1021 (1977); *A & S Electronic Die Corp*., 172 NLRB 1478, 1481 (1968), enfd. 423 F.2d 218 (2d Cir. 1970), cert. denied 400 U.S. 833 (1970).

[37] As indicted above, the Respondent did not produce Pilat to contest this testimony and therefore it can be inferred that Pilat made this statement. *United Technologies Corp.*, 277 NLRB 584, 585 (1985). As there is no reason other than Gervitz' union activity for Pilat to make such a threat, the Respondent violated the Act. The threat to discharge an employee because of her union sympathy and activity is a violation of Sec. 8(a)(1) of the Act. *Chateau de Ville*, 233 NLRB 1161, 1168 (1977); *Holding Co.*, 231 NLRB 383, 384 (1977).

Additionally, the record is replete with instances of disparate treatment of Gervitz who received warnings for breaking some nonexistent rules while other employees received no warnings for ignoring existing rules, i.e., complaints by brokers about being kept waiting or not being announced, which could not be attributed to Gervitz because of her work hours, employee Gielaj was not warned for his smoking on the job, and Gervitz observed employee Alarcon sitting while on duty after the rule about no sitting came out. Disparate treatment supports a prima facie case of discrimination. *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991), enfd. 976 F.2d 744 (11th Cir. 1992), rehearing denied 980 F.2d 1449 (11th Cir. 1992).

The Respondent contends that, "Clearly, Ms. Gervitz' December 12, 2001 warning letter was not only void of union animus," but was fully justified based on her violations of accepted work rules. However, while there is no question that Gervitz was in the room with the monitor she was breaking no accepted rule by being there. Gervitz was never told not to go into the room with the monitor. Even assuming arguendo, that the room with the monitor was the superintendent's office, Simonlacaj admitted that he never told an employee not to enter the superintendent's office and further admitted that if Gervitz needed to speak to the superintendent it would not be unreasonable for her to go to his office. Moreover, Gervitz testified that she never entered the superintendent's office unless he was present.

Additionally, the Respondent has failed to clearly establish that the room with the monitor was the superintendent's office. Although the Respondent produced a warning letter to Pilat dated October 18, 2001 stating that the superintendent's office was to be moved, to the lobby, there was no evidence produced by the Respondent that this actually was done. Gervitz testiied that the superintendent's office had not been moved to the lobby and since Pilot was not called to refute her testimony, I accept it as credible.

When the reasons given for a warning are false or do not exist, the inference can be drawn under the circumstances that such a warning was issued for retaliatory reasons. *Waste Streams Management,* supra. Thus the Respondent has failed to rebut the General Counsel's prima facie case. *Hanson Aggregateo Central, Inc.*, supra. From all of the above, including Pilot's statement to Gervitz when he handed her the warning notice, that the Respondent would do everything possible, even put incorrect things in warning letters, to catch Gervitz and Jagielo and fire them, I find and conclude that the Respondent violated Secion 8(a)(1) and (3) of the Act when it issued Gervitz a warning letter on December 12, 2001, and threatened her with discharge in retaliation for her union membership and activities.

December 12, 2001 Warning Notice to Jagielo

The Respondent issued Jagielo a warning letter on December 12, 2001, that he was found smoking on the job, had refused to get a tenant's dry cleaning from the package room, and had failed to offer assistance with the tenant's packages. Jagielo denied smoking on the job, had not been asked to get the dry cleaning from the package room, and anyway, would have been in contravention of management's instructions had he, in fact, gone to the package room.

Jagielo is a member of the Union. He was also the only other employee besides Nadya Gervitz, who had testified for the Union in Vladimir Gervitz' arbitration proceeding. Moreover, Jagielo had filed charges with the Board alleging retaliation against him for his union activities. The Respondent was aware of all of this. Further, as indicated above, the Respondent had evidenced animus toward both Jagielo and Gervitz because of their union activities.

From the above, I find that the General Counsel has established a prima facie case that the warning notice of December 12, 2001, to Jagielo was issued in retaliation for his union activities in violation of Section 8(a)(1) and (3) of the Act.

The Respondent defends this action on the basis that the warning notice was merited and not issued because of Jagielo's union activities. Joseph testified that a tenant, Allison Fried, had complained to him that Jagielo had failed to offer her assistance when she was carrying packages, did not help her get her dry cleaning from the package room, and instead lit up a cigarette. First, it should be noted that Fried was not called as a witness to testify as to what had occurred. Second, Jagielo denied smoking on the job. Additionally, even assuming arguendo that Fried had asked Jagielo to leave the doorway, assist her in carrying her packages and retrieving her dry cleaning from the package room, both Simonlacaj and Pilat had told the employees that they were not to leave the door unattended to go to the package room, and Jagielo's doing so would fly in the face of these admonitions.

From all the evidence herein, and the Respondent's evident aniumus toward the union members, and the disparate treatment of Jagielo and Gervitz, I am lead to the conclusion that the reason given by the Respondent for the warning notice to him was not its real reason, the Respondent's true reason being Jagielo's union activities. It should also be remembered that Pilat had told Gervitz that the owner would do everything possible, even put incorrect things in warning letters, to in effect build up a case, to catch Jagielo and Gervitz, so that it could fire them.

I therefore, find that when the Respondent issued its December 12, 2001 warning notice to Jagielo, the Respondent violated Section 8(a)(1) and (3) of the Act. *Waste Stream Management,* supra; *Hanson Aggregateo Central, Inc.*, supra.

Jagielo Works a Double Shift

In December 2001, Jagielo was asked to cover for another employee, Alarcon who failed to relieve Jagielo after his shift had ended. Pilat directed Jagielo to cover for Alarcon. Jagielo testified that he asked Pilat if Nadya Gervitz, a part-time worker, anxious to cover for absent employees, could cover for Alarcon because if Jagielo did so, he would be working 24 hours in a 32-hour period. Jagielo stated that Pilat told him if he did not cover for Alarcon he would in effect be fired, "[he] should not come anymore."

The Respondent asserts that while "it occurs infrequently", the general practices is for a doorman to remain on his or her post until relieved. In this case it amounted to Jagielo working a double shift. Normally, I would agree with the Respondent that this in itself did not constitute a violation of the Act since this is

an "industry accepted practice." However, various circumstances present in this case require additional consideration. The Respondent's knowledge of and animus towards Jagielo's union activity. Pilat's threat that if Jagielo refused to work the double shift he would be fired. Also, the availability of one of the Respondent's part-time workers, Gervitz, who had indicated her eagerness to fill in for absent employees.

From the above, I can only infer that by making Jagielo work the double shift at that time and under these circumstances it was for the reason to impose more stringent working conditions on Jagielo in retaliation for his union activities in violation of Section 8(a)(1) and (3) of the Act. *Georgia Farm Bureau*, supra; *Maywood, Inc*., 251 NLRB 979, 987–991 (1980).

Nadya Gervitz and Kazimierz Jagielo are Denied a Christmas Bonus in 2001

The evidence shows that Gervitz and Jagielo were the only two employees who did not receive Christmas bonuses in 2001. The Respondent's animus towards the union activity of these two employees has been discussed above. Moreover, the Respondent gave Christmas bonuses to all other employees, none of whom testified at Vladimir Gervitz' arbitration, or had filed charges with the Board alleging discrimination by the Respondent against them because of their union activity and, according to the credited and uncontroverted testimony of Gervitz and Jagielo, some of these other employees had engaged in infractions of the Respondent's rules and regulations without penalty.

Simonlacaj testified that he denied Gervitz a bonus because of the verbal and written warnings she had received precipitated by complaints from tenants and brokers during 2001. As discussed above, I found that these written warnings were issued to Gervitz mainly because of her union activity and the Respondent's animus towards the Union. It is therefore highly suspicious that the Respondent singled out not to receive Christmas bonuses the two employees, Gervitz and Jagielo, who had both testified at Vladimir Gervitz' arbitration and further had filed charges against the Respondent with the Board alleging discrimination based on their union activities.

Simonlacaj also testified that Jagielo failed to receive a bonus because he did not dress properly in his uniform, failing to wear his uniform tie and hat, and was unpleasant when criticized about this. Jagielo testified that he had explained to Simonlacaj that his uniform had been stolen, and denied that he was unpleasant to Simonlacaj when they discussed this. Simonlacaj stated that he had spoken to Jagielo about wearing a hat and tie unsuccessfully but during the incident above, the Respondent's witnesses did testify that the day was very hot, another employee Alarcon was not wearing his hat either, and no written warning was issued to either employee. Alarcon, however, did receive a Christmas bonus.

Simonlacaj also testified that he had told Jagielo that he should not be sitting or eating on the job. Both Gervitz and Jagielo testified that until they received the Respondent's list of rules on or about December 12, 2001, they had never been told that sitting was forbidden. While Simonlacaj testified that the no sitting rule was in effect since January 2001, the credited testimony of Gervitz and Jagielo is further supported by the list of rules issued by the Respondent's on April 27, 2001, which makes no mention of employees being forbidden to sit. Moreover, Jagielo never received a warning for sitting on the job, and even after the end of the year rules came out, as Gervitz testified, Alarcon sat while on duty in front of Pilat without receiving any warning, and Alacon received a Christmas bonus.

As to eating while on duty, this was not listed in the April 27, 2001 rules, and Jagielo received no warnings for eating while on duty. Eating while on duty may well have been a necessity since Jagielo was not given a lunch hour, night shift doormen such as Jagielo had to eat on duty because there was no one to relieve them, and again as Gervitz testified uncontradictedly, Alarcon the recipient of a Christmas bonus, ate while on duty in front of Pilat without notice of warning from the Respondent.

Also, Simonlacaj appeared to specifically hold against Jagielo the general complaints from brokers about doormen smoking, not being at their posts, not being courteous, and not helping tenants. However, Jagielo worked the 11 p.m. shift every day but Sunday, a time when brokers appeared only infrequently. Moreover, Joseph's testimony that he was told that doormen weren't opening doors and greating people semed to apply to all doormen, all of whom, other than Jagielo and Gervitz, received bonuses. Interestingly, Joseph testified that he had observed that Jagielo was not "smooth" with someone entering the building. When Joseph coached him, however, Jagielo "smoothed" out his style, to correct his behavior.

While the record shows that Gervitz and Jagielo had received bonuses in prior years, the evidence supports the conclusion that the failure of the Respondent to give them bonuses in 2001 was because of their union membership and activities and therefore, based on the Respondent's discrimination against them was in violation of Section 8(a)(1) and (3) of the Act. *Iliana Transit Warehouse Corp*., 323 NLRB 111, 118–119 (1997).

Threat to Discharge Jagielo

Jagielo testified that in late January 2002, knowing that Viny Kolandreo was on vacation, Jagielo called Pilat, when he was finishing his shift in the early morning to find out if a replacement for him had been found. Pilat started to scream at Jagielo that Jagielo had woken Pilat and his family and that he was going to tell the Respondent to terminate his job. Jagielo then went home and being extremely worried about losing his job, he returned and spoke to Pilat, telling him that he was very sorry about what happened. Pilat then told him not to worry, that there is no problem.

The General Counsel in her brief asserts that in view of the numerous statements Pilat made against Jagielo for his union activity, the last of which occurred around the time he threatened Jagielo with discharge, the logical inference is that the threat was made because of Jagielo's union activity. I do not find the evidence sufficient to draw such an inference. This incident clearly stands out to me as one isolated from Jagielo's union activities. According to Jagielo's testimony, he woke Pilat and his family early in the morning. That Pilat was very annoyed at Jagielo for this is obvious and when Jagielo returned and Pilat quieted down, Pilat told him not to worry about it. I do not find under these circumstances that Pilat threatened

to discharge Jagielo because of his union activities in violation of Section 8(a)(1) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discriminated against Nadya Gervitz and Kazimierz Jagielo, the Respondent shall be ordered to make them whole for any loss of earnings or other benefits by reason of the discrimination against them in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971),[38] with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). These amounts should include the Christmas bonuses with interest for Gervitz and Jagielo that they were denied. Additionally, Nadya Gervitz should be made whole with interest as computed above for the Respondent's failure to allow her to cover for absent employees to be determined at the supplemental stage of these proceedings.

Having found that the Respondent unlawfully issued written warnings to Nadya Gervitz and Kazimierz Jagielo dated December 12, 2001, the Respondent shall be ordered to rescind such warning notices to Gervitz and Jagielo.

Because of the nature of the unfair labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent shall also be required to post the customary notice.

CONCLUSIONS OF LAW

1. Property Markets Group, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 32B–32J, SEIU, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act. At all material times, Nadya Gervitz and Kazimierz Jagielo have been members of the Union.

3. At all material times, John Simonlacaj (property manager) and Elliot Joseph (asset manager) have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent, acting in its behalf.

4. At all times material, herein superintendent Alek Pilat has been an agent of the Respondent, acting in its behalf.

5. Since August 2001 the Respondent has unlawfully failed and refused to allow Nadya Gervitz to cover for absent employees, to the extent previously allowed, in violation of Section 8(a)(1) and (3) of the Act.

6. That on December 12, 2001, the Respondent unlawfully issued Gervitz a warning letter in violation of Section 8(a)(1) and (3) of the Act. When Pilat delivered the warning letter to Gervitz, Pilat threatened her with discharge because of her union activities in violation of Section 8(a)(1) of the Act.

7. That on December 12, 2001, the Respondent unlawfully issued Jagielo a warning letter in violation of Section 8(a)(1) and (3) of the Act.

8. In December 2001, the Respondent unlawfully compelled Jagielo to work a double shift in retaliation for his Union activities in violation of Section 8(a)(1) and (3) of the Act.

9. In or about December 2001, the Respondent unlawfully failed to give Gervitz and Jagielo Christmas bonuses because of their membership in and activities for the Union in violation of Section 8(a)(1) and (3) of the Act.

10. The Respondent did not violate the Act in any other manner.

11. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Property Markets Group, Inc., New York City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to allow Nadya Gervitz to cover for absent employees since August 2001, to the extent she did so previously, because of her union activities or protected activities.

(b) Threatening Gervitz with discharge because of her union activities.

(c) Discriminatorily issuing warning notices to Gervitz and Jagielo because of their union or protected concerted activities.

(d) Unlawfully ordering Jagielo to work a double shift because of his union activities.

(e) Unlawfully failing and refusing to grant Gervitz and Jagielo a Christmas bonus in December 2001, because of their union activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[38] *American Tissue Corp.*, 336 NLRB 435 fn. 3 (2001).

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Make Nadya Gervitz and Kazimierz Jagielo whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of this decision, including the Christmas bonuses not granted to them.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings to Nadya Gervitz and Kazamierz Jagielo and within 3 days thereafter, notify them in writing that this has been done and that the warnings will not be used against them in any way.[40]

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all its facilities in New York City, New York, copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense a copy of the notice to all current employees and former employees employed by the Respondent since January 8, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[40] While Gervitz required a Russian interpreter while testifying and Jagielo a Polish interpreter, this was because of the intricacies of direct and cross-examination. However, both acknowledged an understanding of some English.

[41] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to allow employees to cover for absent employees because of their union membership and activities on behalf of the Union.

WE WILL NOT threaten our employees with discharge because of their membership in and support for the Union.

WE WILL NOT issue our employees warning letters because of their union membership and support.

WE WILL NOT compel our employees to work double shifts in retaliation for their union activities and support.

WE WILL NOT deny employees Christmas bonuses because of their union membership and activities in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed to you by Section 7 of the Act.

WE WILL make Nadya Gervitz and Kazimierz Jagielo whole for any loss of earnings and other benefits with interest suffered as a result of the discrimination against them less interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful disciplinary warnings to Nadya Gervitz and Kazimierz Jagielo and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the warnings will not be used against them in any way.

PROPERTY MARKET GROUP, INC.